

Louisiana Law Review

Volume 65 | Number 3
Spring 2005

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Repository Citation

Paul R. Baier, *On Being Knighted by the Louisiana Bar Foundation: Distinguished Professor 2004*, 65 La. L. Rev. (2005)
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Doug Carmouche/LSU Law

On Being Knighted by the Louisiana Bar Foundation: Distinguished Professor 2004*

—Remarks at the 19th Annual Fellows Dinner, April 15, 2005,
Ritz-Carlton Hotel, New Orleans.

*Paul R. Baier***

PRESIDENT BIENVENU, DIRECTORS OF THE BAR FOUNDATION,
CHIEF JUSTICE CALOGERO, JUDGE KONRAD, MESSIEURS
CURET AND MURRAY, DISTINGUISHED GUESTS, COLLEAGUES,
FAMILY AND FRIENDS:—

Do you know Camelot? Barbara and I are living the legend tonight. She, my Princess. I, her Knight—in Black-Tie. Why, it is as though the Louisiana Bar Foundation has touched my shoulder with the sword of crowning achievement. Being knighted Distinguished Professor 2004 is one of the great honors of my life. May I say that in spite of all that I know to the disadvantage of the subject, it makes me proud.¹

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* *Editors' Note:* The Board of Editors of Volume 65 of the *Louisiana Law Review* is proud to join the Louisiana Bar Foundation in honoring Professor Baier as its Distinguished Professor 2004. We know him best from his teaching in the Law Review seminar where he embodies the spirit of Will Strunk. Professor Baier has annotated his speech to the Bar Foundation for publication in the *Review*. It is a bright example of his best.

Photograph by Doug Carmouche, reproduced here courtesy of Wade Shows, Michael Palmintier, and Ed Walters—Professor Baier's former students and his friends for thirty years' running.

** George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Member of the Louisiana Bar. Judicial Fellow, Supreme Court of the United States, 1975–1976; Executive Director, Louisiana Commission on the Bicentennial of the United States Constitution, 1987–1991; Scholar-in-Residence, Louisiana Bar Foundation, 1990–1992.

1. I have cribbed from Justice Holmes's letter to the Editors of the Harvard Law Review, June 8, 1931, written from Beverly Farms, a note of thanks for a symposium issue celebrating Justice Holmes's ninetieth birthday. See Symposium, *Mr. Justice Holmes—Tributes*, 44 Harv. L. Rev. 677 (1931). Justice Holmes's festschrift features tributes from Chief Justice Charles Evans Hughes and Justice Benjamin Cardozo. Said Holmes to the Editors: "Let me say that I regard the number as one of the great honors of my life and that in spite of all that I know to the disadvantage of the subject, it makes me proud." Letter from Oliver Wendell Holmes, Jr., to the Editors of the Harvard Law Review (June 28, 1931), in *The Book of Peppercorns*, Collected, Compiled, and Thrown Together by Frederick Bernays Wiener 21 (1931). This is a remarkable scrapbook from the Note Editor of Volume 43 of the Harvard Law Review, a sometime student of Professor Samuel Williston at Harvard Law School, 1927–30. Mr. Wiener compiled his scrapbook in Providence, Rhode Island, where he was first called to the Bar. I found the

Sixty years have elapsed since the Year of Our Lord One Thousand Nine Hundred Forty-four. I will not bother you with the intervening details of my life. But I may mention a few thoughts that come to me as a listener-in. Hearing the kind voice of friends touches me deeply.²

I.

First, a word about what the Louisiana Bar Foundation means to me, as your latest distinguished professor.

I recall Eldon Fallon's invitation to become the first Scholar-in-Residence of the Bar Foundation. This was fifteen years ago. Judge Jimmy Gulotta and Marcel Garsaud were present. They can avouch my answer. They heard me ask Mr. Fallon in turn, "Must I move in with you?"

"Oh, no, 'Scholar-in-Residence' is a metaphor," Judge Fallon whispered in my ear. Thereafter for two happy years, I was able to live my life metaphorically.

I will never forget the L.B.F.'s *Conclave Report*.³ Worthy figures from Chief Justice Calogero and LeDoux Provosty—God bless him—on down to my lowly level met at the Hotel Bentley in Alexandria for two days of table talk on legal education and professional development. It fell to me to render the report. All I had was a transcript of the dialogue, some of it quite loose. As you may know, it is quite alarming to read one's own extemporaneous discourse in print. But with a little nursing of the transcript—I say "nursing," not "doctoring"—and with the help of Selden's *Table Talk* as Muse, our Editorial Committee rendered a report that the Louisiana Bar Foundation published in 1995.

I still think that next to the Bible and the Louisiana Civil Code, the L.B.F.'s *Conclave on Legal Education and Professional Development* is the third most important book in the history of Western Civilization.

Surely the quotation from Selden's *Table Talk* on the "GREAT CONJUNCTION" featured in our report, fits the situation aptly. I quote: "The great conjunction of Saturn and Jupiter happens but once

original hand-penned envelope in which Justice Holmes sent his note of thanks to the Editors of the Harvard Law Review tucked away in The Book of Peppercorns with a typescript of Holmes's letter. How it came to be there, I can only speculate.

2. Again, Holmes is my muse, his ninetieth birthday address to the Nation, broadcast on the radio, March 8, 1931. Oliver Wendell Holmes, Jr., *The Race Is Over*, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 178 (Mark DeWolfe Howe ed., 1962).

3. *Conclave on Legal Education and Professional Development* (Louisiana Bar Foundation, 1995) [hereinafter *Conclave Report*].

in 800 years and therefore Astrologers can make noe experiment of it nor foretell what it means."⁴

To this day, I am not sure what the Great Conjunction at Alexandria means. I am sure, however, that the Bar Foundation's Scholar-in-Residence Program knocked two books out of me, the other being *Lions Under the Throne*,⁵ the Edward Douglass White Lectures of Chief Justices Warren E. Burger and William H. Rehnquist. In truth, whatever distinction I have achieved I owe in large measure to the Louisiana Bar Foundation itself.

But beyond books, there is the fellowship of the Bar Foundation's Round Table. To mention only one figure, may I say I regard the company of Judge Jimmy Gulotta as one of the great blessings of my life. Why is that? Because, he is in my favorite—Don Quixote, de la Mancha! And I, Sancho, I'm his squire, I'm his friend. Why do I follow him? That's easy to explain. It's because, . . . because,

I like him. I really like him.
Tear out my fingernails one by one,
I like him.

I don't have a very good reason,
Since I've been with him cuckoo nuts
have been in season.

But there's nothing I can do,
Chop me up for onion stew,
Still I yell to the sky,
though I can't tell you why,
That I, like him.⁶

You can tell there is a kind of Broadway theme to my remarks. The distinction of the Louisiana Bar Foundation has filled my heart with music.

I promised Mrs. Baier to say not a word about "Father Chief Justice,"⁷ the award-winning play sponsored by the Louisiana Bar

4. *Table Talk at the Hotel Bentley: Conclave Highlights*, in *Conclave Report*, *supra* note 3, at 68 (Paul R. Baier, Editorial Chair).

5. *Lions Under the Throne: The Edward Douglass White Lectures of Chief Justices Warren E. Burger and William H. Rehnquist* (Paul R. Baier ed., 1995).

6. *I Really Like Him, on Man of La Mancha* (MCA Records 1990).

7. Paul R. Baier, "Father Chief Justice": Edward Douglass White and the Constitution, A Play by Paul R. Baier (1997) (a play of five acts, continuing production co-sponsored by the Louisiana Bar Foundation and the United States Civil War Center). "Father Chief Justice," which I direct, premiered March 8, 1997 (Holmes's birthday) in the Theater of the Jean Lafitte National Historic Park, Thibodaux, Louisiana. Justice Harry T. Lemmon of the Louisiana Supreme Court (ret.) plays the lead role as E. D. White; Chief Judge William V. Redmann (ret.) plays Mr. Justice Holmes; U.S.D.C. Judge Mary Ann Vial Lemmon plays Fanny

Foundation.

Guenevere, Harry Hardin—indeed The Good Lord himself in whose bosom Chief Justice White rests eternally—have heard quite enough of the play already. I must move on.

II.

Another thought that occurs to me on the being knighted by the Louisiana Bar Foundation is the split personality that I bring to your Table. What I mean is the contrast between the professor's universe and the practitioner's arena.⁸ It is the fact that the practicing Bar sometimes thinks of professors as "Cloud-Heads." I quote one of the *Conclave Report's* topical rubrics.

Holmes; Mrs. Alvin B. Rubin, Baton Rouge, plays the Widow White; I play the role of the narrator, Professor Richard Henry Jesse, first academic Dean of the University of Louisiana (now Tulane University), who in his day was a close personal friend of Chief Justice White. "Father Chief Justice" played at Louisiana's Old State Capitol, April 29, 2000, as part of the Baton Rouge Bar Association's A. B. A. award-winning Law Day Celebration. Most recently, the John Boutall Inn of Court featured a run of the play at the Louisiana Fifth Circuit Court of Appeal, April 19, 2005, Gretna, Louisiana. A preview of the play has been published, Paul R. Baier, "Father Chief Justice": *E. D. White and the Constitution*, 58 La. L. Rev. 423 (1998). Act III, "At Home," appears in the Summer 1998 number of *Litigation*, Paul R. Baier, *The Blue and Gray as One: Holmes and White on the Supreme Court*, 24 *Litigation* 76 (1998). Act IV, "By the Light of Reason," is the lead article in a recent number of the Loyola University New Orleans *Journal of Public Interest Law*, Paul R. Baier, "By the Light of Reason": *Edward Douglass White and the Constitution*, 6 Loy. J. Pub. Int. L. 1 (2005).

8. I have in mind the words of Theodore Roosevelt, as they appear on a keepsake plaque given to me by Section 3A, Spring Term 1996:

The Man in The Arena

It is not the critic who counts, nor the man who points out how the strong man stumbled or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly, who errs and comes up short again and again; who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who at best knows in the end the triumphs of high achievement; and who at the worst, if he fails, at least fails while daring greatly; so that his place shall never be with those cold and timid souls who know neither defeat nor victory!

9. "CLOUD-HEADS" is listed in The Table of Rubrics in the *Conclave Report*, where the reader is referred to page 168 of the Table Talk. Turning to the page, one finds Professor Catherine Hancock of Tulane Law School holding forth at the Hotel Bentley, thus: "I meet a lot of lawyers and judges who think that law teachers have their heads in the clouds and don't even care about the bar." *Table Talk*, *supra* note 4, at 168. Professor Hancock, to her credit, quickly defends herself: "I don't think that's true." *Id.*

According to Justice Holmes, a great chasm divides the cloister from the courtroom. Here are his words:

The professor, the man of letters gives up one-half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril on a living question, for purposes of action, calls upon your whole nature.¹⁰

One of my proudest boasts is that I am a member of the Louisiana Bar. I have experienced the crush of the arctic ice myself.¹¹ I am bold in happy moments to believe that my efforts in court—sometimes up,¹² sometimes down¹³—counted in measuring your Distinguished Professor 2004.

The camaraderie of the Bar, the Fraternity of the Fight, has enabled me to live a whole life—a life, I make bold to say, split in two.

10. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law* (1899), in *Collected Legal Papers* 224 (1920).

11. See George Otis Shattuck, *Answer to Resolutions of the Bar* (Boston, May 29, 1897), in *Occasional Speeches*, *supra* note 2, at 92, 95:

I know of no true measure of men except the total of human energy which they embody—counting everything, with due allowance for quality, from Nansen's power to digest blubber or resist cold, up to his courage, or to Wordsworth's power to express the unutterable, or to Kant's speculative reach. The final test of this energy is battle in some form—actual war—the crush of the Arctic ice—the fight for mastery in the market or the court. Many of those who are remembered have spared themselves this supreme trial, and have fostered a faculty at the expense of their total life. It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend.

12. Before the United States Court of Appeals for the Fifth Circuit (Smith, Duhé & Wiener, JJ.): *United States v. State of Louisiana*, 9 F.3d 1159 (5th Cir. 1993). I served as Special Counsel for Louisiana Attorney General Richard P. Ieyoub on the rebuttal argument against the United States urging reversal. This was the *Louisiana Higher Education Desegregation Case*, in which the district court had dismantled the four state higher education governance boards and the Southern University Law Center, all of which we stoutly opposed in the Fifth Circuit. *Held*: Remedial order VACATED; summary judgment on liability REVERSED; REMANDED. Thereafter, this twenty-year old litigation was sweetly settled and Southern University Law Center continues its vital work today.

13. Before the United States Court of Appeals for the Fifth Circuit (Clark, C.J., Politz, Randall, JJ.): *Valley v. Rapides Parish School Board* [Forest Hill II], 702 F.2d 1221 (5th Cir. 1983). The second-round Forest Hill appeal, contesting the district court's reaffirmance of its decision to close Forest Hill Elementary School. I argued the appeal on May 26, 1981, and after a wait of *twenty-two months*, on March 30, 1983, the Fifth Circuit split 2 to 1, affirming the district court's decision closing Forest Hill Elementary School (Politz, J., joined by Randall, J.; Chief Judge Charles Clark dissenting). A heartbreaker. Of course, the professor has the advantage of the last word. See, e.g., Paul R. Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. 123 (1986).

Of course the classroom is the source of my greatest joy. "A teacher affects eternity; [s]he can never tell where h[er] influence stops."¹⁴ David Bienvenu's letter announcing my selection as Distinguished Professor 2004 jolted me into realizing that I have been teaching at LSU Law School for more than half of my life. Yet my teaching is not over. The joy of the classroom in fact is renewed each day. In sum, the Louisiana Bar Foundation's Distinguished Professor 2004 is a very lucky man. This is better than Camelot.

Distinction in teaching lies mainly in the hearts of your students. If you give all of your might to their success—if they sense you really love them—your students will honor you with their blood, should leukemia strike you.

The other day I received a letter from Archibald Cox, my teacher at Harvard Law School. He had retired to Maine. He was in his nineties. He was of the Old School. His teaching meant much to me.

I sent him a note of thanks after thirty years' teaching myself. I have his reply in hand. I want to share a highlight of his letter with you:

I greatly appreciated your kind words for my teaching. You have probably been teaching long enough now to know that the greatest satisfaction comes to a professor from a former student's saying that one's teaching contributed.¹⁵

In honoring me, the Louisiana Bar Foundation honors my teacher Archibald Cox. I believe he would be pleased on both accounts.

III.

Let me bring my remarks to a close by way of one of the great treasures of the LSU Law Library. I mean Holmes's *Speeches*, a collection originally published by Little, Brown, and Company in 1891—"if not quite a Bible, still a book of most uncommon prayer."¹⁶

14. Henry Adams, *The Education of Henry Adams* 300 (1931).

15. Letter from Archibald Cox, writing from Condon Point Road, Brooksville, Maine, to Paul R. Baier (Oct. 26, 2000) (original on file with author).

16. I owe my discovery of the treasure of Holmes's *Speeches* to an old Soldier of the Law, Colonel Frederick Bernays Wiener, Retired, who visited the LSU Law Center in the Fall of 1979. At a black-tie dinner in his honor, he told his audience of his own legal studies at the Harvard Law School, LL.B, 1930, and of the place of Holmes's *Speeches* in his upbringing:

Now for me, this little book was, if not a Bible, still a book of most uncommon prayer. And one speech in that collection afforded me through many weeks and many months that were full of trial and pressure great comfort and much reassurance.

And that was the talk made to the Boston Bar Association in early 1900, just after Holmes had become Chief Justice of the highest Court of Massachusetts.

I found a first edition on the open stacks of our Law Library. I could tell from the circulation card inside the back cover that the book had never been checked out. It has been in the Baier Rare Book Room at the LSU Law Center ever since.

I want to share with you the closing sentences of Justice Oliver Wendell Holmes's 1900 address to the Boston Bar Association because they so very accurately express my own feelings here tonight:

I will add but a word. We are all very near despair. The sheathing that floats us over its waves is a compound of hope, faith in the unexplainable worth and sure issue of effort, and the deep, sub-conscious content which comes from the exercise of our powers. In the words of a touching negro song—

Sometimes I's up, sometimes I's down,
Sometimes I's almost to the groun';

but these thoughts have carried me, as I hope they will carry the young men who hear me, through long years of doubt, self-distrust, and solitude. They do now, for, although it might seem that the day of trial is over, in fact it is renewed each day. The kindness which you have shown me makes me bold in happy moments to believe that the long and passionate struggle has not been quite in vain.¹⁷

I read and re-read that talk times uncounted. And then, right at the beginning of my third-year, and that's exactly fifty years ago this month, I met a Boston lawyer who had actually been present when the talk was delivered. This was Mr. George R. Nutter, who had been one of the editors of Volume I of the *Harvard Law Review* and who later became a partner of Mr. Louis D. Brandeis, because just before the latter became Mr. Justice Brandeis, the firm name had been Brandeis, Nutter & McClennan.

So I asked Mr. Nutter, "What was the reaction of those present when the Chief Justice's talk was concluded?" And he replied there really wasn't any. They were just too moved and really too stunned even to applaud.

Frederick Bernays Wiener, *Speech at LSU Law Center*, October 16, 1979, Plantation Room, LSU Union, *quoted in* Paul R. Baier, *Speeches and Select Legal Papers*, with a Foreword by Justice Harry A. Blackmun, xiv-xv (unpublished manuscript in possession of author, 1997).

17. Oliver Wendell Holmes, Jr., *Speech At a Dinner Given to Chief Justice Holmes By the Bar Association of Boston* (March 7, 1900), in *Occasional Speeches*, *supra* note 2, at 122, 126.